

or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph creates a defense to a violation of § 219.102 of this part.

(2) Each Class I railroad (including the National Railroad Passenger Corporation) and each railroad providing commuter passenger service shall implement its approved random testing program not later than January 16, 1990. Each Class II railroad shall implement its approved random testing program not later than July 2, 1990. Each Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall implement its approved random testing program not later than November 1, 1990. In the case of a railroad commencing operations after the pertinent date set forth in paragraph (a) of this section for filing of a program, the railroad shall implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator or by the pertinent date set forth in this paragraph, whichever is later.

[54 FR 53259, Dec. 27, 1989, as amended at 59 FR 7462, Feb. 15, 1994]

§ 219.602 Administrator's determination of random drug testing rate.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from railroads, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for

random drug testing will be applicable starting January 1 of the calendar year following publication.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.803 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 219.803 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(e) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, *i.e.*, no employee may be selected as a result of the exercise of discretion by the railroad. The selection method shall be capable of verification with respect to the randomness of the selection process.

(f) The railroad shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the railroad conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual railroad or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(g) Each railroad shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests

are spread reasonably throughout the calendar year.

(h) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same railroad, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(i) If a railroad is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

[59 FR 62228, Dec. 2, 1994]

§ 219.603 Participation in drug testing.

Participation. A railroad shall, under the conditions specified in this subpart and subpart H, require a covered employee selected through the random testing program to cooperate in urine testing to determine compliance with § 210.102, and the employee shall provide the required sample and complete the required paperwork and certifications. Compliance by the employee shall be excused only in the case of a documented medical or family emergency.

[54 FR 53259, Dec. 27, 1989, as amended at 59 FR 7463, Feb. 15, 1994]

§ 219.605 Positive drug test results; procedures.

(a) *Medical review.* The result of a test required under this subpart shall be deemed positive only after it has been properly confirmed as required in subpart H of this part and reviewed by a Medical Review Officer (MRO) as provided in subpart H to determine if it is evidence of prohibited drug use under § 219.102.

(b) Procedures for administrative handling by the railroad in the event a sample provided under this subpart is

reported as positive by the MRO are set forth in § 219.104 of this part. The responsive action required in § 219.104 is not stayed pending the result of a retest or split sample test.

[54 FR 53259, Dec. 27, 1989, as amended at 59 FR 7463, Feb. 15, 1994]

§ 219.607 Railroad random alcohol testing programs.

(a) Each railroad shall submit for FRA approval a random alcohol testing program meeting the requirements of this subpart. A Class I railroad (including the National Railroad Passenger Corporation) or a railroad providing commuter passenger service shall submit such a program not later than August 15, 1994. A Class II railroad shall submit such a program not later than February 15, 1995. A Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall submit such a program not later than August 15, 1995. A railroad commencing operations after the pertinent date specified in this paragraph shall submit a random alcohol testing program not later than 30 days prior to such commencement. The program shall be submitted to the Associate Administrator for Safety, FRA, for review and approval. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad shall file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program shall not be implemented prior to approval.

(b) *Form of programs.* Random alcohol testing programs submitted by or on behalf of each railroad under this subpart shall meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents shall conform to such criteria in implementing the program:

(1) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a